ROYAL SELANGOR CLUB

v.

DEVAGI KARPEYA

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL APPEAL NO: R1-16-19-03]
13 JULY 2009

CIVIL PROCEDURE: *Appeal - Appeal to High Court - Amount in dispute or value of subject matter RM10,000 or less - Operation of s. 28(1) Courts of Judicature Act 1964 - Subject to any other written law - Whether s. 28(1) subject to s. 77(1) Employment Act 1955 - Employer appealing against termination benefits of RM8,660.73 awarded by labour officer to employee - Whether such appeal precluded by s. 28(1) - Whether memorandum of appeal raised questions of law*

LABOUR LAW: *Employment - Contract of service - Termination under s. 13(2) Employment Act 1955 - Domestic inquiry - Whether required to be held - Termination benefits*

LABOUR LAW: *Employment - Termination benefits - Entitlement under reg. 4(1)(c) Employment (Termination & Lay-Off Benefits) Regulations 1980 - Whether employee entitled to termination benefits where contract of service was terminated by employer under s. 13(2) Employment Act 1955 as a result of employee's wilful breach - Whether only entitled where employee terminates contract voluntarily under s. 13(2) because employer wilfully breached condition of contract*

This was an appeal by the employer under s. 77(1) Employment Act 1955 ('EA55') against the decision of the labour officer awarding the employee termination benefits (RM8,660.73) despite his decision, upon an enquiry under s. 69 EA55, that the employer was justified in terminating the services of the employee under s. 13(2) EA55 on the ground that the employee had breached her contract of employment under s. 15(2) EA55 read together with s. 60F(2) EA55.

The issues central to this appeal were: (i) whether the appeal was precluded by s. 28(1) Courts of Judicature Act 1964 ('CJA64') as the amount in dispute or value of the subject matter was less than RM10,000; (ii) whether a domestic inquiry has to be conducted *vis-a-vis* termination of employment under s. 13(2) EA55; and (iii) whether the employee was entitled to termination benefits under reg. 4(1)(c) Employment (Termination & Lay-Off Benefits)

A Regulations 1980 ('the Regulations') when her contract of service was terminated by the employer under s. 13(2) EA55 as a result of her wilful breach (wrongful absenteeism).

Held (allowing the employer's appeal):

B **(1)** Section 28(1) CJA64 - which imposes a RM10,000 threshold on the amount in dispute or value of the subject matter - must be read "subject to any other written law" such as s. 77(1) EA55. The express right of appeal embodied in s. 77(1) EA55 is, therefore, unaffected by the limitation prescribed under s. 28(1) C CJA64. In any case, the employer's memorandum of appeal did raise questions of law on the appeal. (*Kuala Lumpur Kepong Bhd (Ladang Sungei Jernih) v. Subramaniam Sinnappan & Ors)* (foll) (para 3)

D **(2)** A domestic inquiry is not required for the termination of employment under s. 13(2) EA55. That this is so is clear from the express words of the provision itself. The employer was, therefore, under no obligation to hold one. (*Lim Poh Poh v. Menteri Sumber Manusia (Malaysia))* (foll) (para 6)

E **(3)** The relevant provision relied upon by the labour officer was reg. 4(1)(c) of the Regulations. The proviso in reg. 4(1)(c) is only applicable where an employee terminates the contract of employment as a result of a wilful breach by the employer. Hence, it is only where an employee terminates the contract F voluntarily (under s. 13(2) EA55) - because the employer has wilfully breached a condition of the contract - would the employee be entitled to termination benefits. Here, conversely, it was the employer who had terminated the contract of employment as a result of a wilful breach by the employee. It would be contrary to the spirit and intendment of the EA55 to G pay out termination benefits to employees who have wilfully breached their contracts of employment. (para 8)

Case(s) referred to:

Kuala Lumpur Kepong Berhad (Ladang Sungei Jernih) v. Subramaniam Sinnappan & Ors [1997] 1 LNS 91 HC ***(foll)***

H *Lim Poh Poh v. Menteri Sumber Manusia, Malaysia [1998] 1 LNS 440 HC* ***(foll)***

Neoh Choo Ee & Co Sdn Bhd lwn. Vasalamany Govindasamy Dan Satu Lagi [1996] 1 LNS 448 HC ***(refd)***

Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor [2004] 3 CLJ 321 CA ***(refd)***

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Legislation referred to:
Employment Act 1955, ss. 13(2), 15(2), 60F(2), 69, 77(1)
Courts of Judicature Act 1964, ss. 14(1), 28(1)
Employment (Termination and Lay-Off Benefits) Regulations 1980, reg. 4(1)(a), (b), (c)

For the appellant - J Adeline; M/s Zul Rafique & Partners
For the respondent - VK Raj; M/s P Kuppusamy & Co

[Editor's note: The employee's contention that the labour officer could have mistakenly stated reg. 4(1)(c) of the Regulations in his decision (when he had meant to rely on reg. 4(1)(b) thereof) was rejected by the learned judge.]

Reported by Gan Peng Chiang

JUDGMENT

Lau Bee Lan J:

[1] The appellant (employer) has appealed pursuant to s. 77(1) of the Employment Act 1955 ("the Act") against part of the decision of the Assistant Director of Labour ("the labour officer") given on 5 December 2002 and made on an inquiry conducted under s. 69 of the Act ie, that the appellant is liable to pay the respondent termination benefits of RM8,660.73 after having concluded that the appellant was justified in terminating the services of the respondent under s. 13(2) of the Act on the ground that the respondent had breached her contract of employment under s. 15(2) of the Act read together with s. 60F(2) of the same.

[2] Learned counsel for the appellant drew to the court's attention two High Court cases on the interpretation of s. 77(1) of the Act:

(i) *Neoh Choo Ee & Co Sdn Bhd lwn. Vasalamany Govindasamy Dan Satu Lagi* [1996] 1 LNS 448; and

(ii) *Kuala Lumpur Kepong Berhad (Ladang Sungei Jernih) v. Subramaniam Sinnappan & 43 Ors* [1997] 1 LNS 91.

[3] I adopt the position taken by the learned judge in *Kuala Lumpur Kepong Berhad (Ladang Sungei Jernih) (supra)* that s. 77(1) of the Act gives an express right of appeal to the appellant and does not place any limitation on the value of the appeal and thus s. 28(1) of the Courts of Judicature Act 1964 does not apply. This view is fortified by the opening words in s. 28(1) of the CJA which states "Subject to any other written law" preceding the other part of the provision "no appeal shall lie to the High Court from a

A decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject-matter is ten thousand ringgit or less except on a question of law." The written law in question is the Employment Act and to reiterate there is no restriction on the quantum of the subject matter.

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(a) In the event I am wrong and s. 28(1) of the CJA is applicable to this appeal, I agree as submitted by learned counsel for the appellant there are questions of law which arises in this appeal as is evident from the Memorandum of Appeal. Support for this position taken is the case of *Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor* [2004] 3 CLJ 321 at p. 330 when the Court of Appeal stated "[s. 28(1)] does not say that the notice of appeal should expressly state the questions of law ... That points of law will in the usual way be taken in the memorandum of appeal and it is that document that the High Court should have resort."

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[4] As correctly pointed out on the appellant's behalf, the labour officer in his findings found:

(i) the respondent has breached her contract by continuously being absent from work for more than two consecutive working days (s. 15(2) of the Act), read together with s. 60F(2) of the Act, which requires the respondent to inform the appellant of her sick leave within forty-eight hours;

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(ii) in the circumstances, the appellant was justified in terminating the services of the respondent under s. 13(2) of the Act for the breach of her contract under s. 15(2) of the Act;

(iii) hence, the respondent was not entitled to her claim for salary *in lieu* of notice; and

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(iv) since the respondent's contract was terminated under s. 13(2) of the Act, the respondent was entitled to be paid termination benefits. In this regard, the Labour Officer further held that:

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(a) this was not a case of termination of employment after due inquiry; or upon attaining the age of retirement; or a voluntary termination; and

(b) in the circumstances, reg. 4(1)(c) of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ("the Regulations") is applicable. (p. 16 Appeal Record).

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[5] Learned counsel for the respondent submitted the decision was correct on three grounds: A

(i) since there was no domestic inquiry conducted against the respondent, s. 14(1) of the Act is applicable;

(ii) Section 14(1) of the Act guarantees due inquiry to employees who are protected under the Act. Since there was no due inquiry conducted, the respondent was entitled to termination benefits under reg. 4 of the Regulations; and B

(iii) The Labour Officer had clearly misstated the applicable regulation, which ought to have been reg. 4(1)(b) of the Regulations (instead of reg. 4(1)(c)). C

[6] At the hearing of the appeal on 29 May 2009, the respondent conceded on the point that the finding by the Labour Officer in terminating the services of the respondent under s. 13(2) of the Act read with s. 15(2) of the same was correct. As alluded to earlier the appeal of the appellant is only with regard to that part of the Labour Officer's decision that the appellant is liable to pay termination benefits to the respondent. Since there is no cross-appeal by the respondent, it means that the decision of the Labour Officer that the appellant was right in terminating the services of the respondent under s. 13(2) of the Act read with s. 15(2) of the same remains unchallenged. D E

(a) I agree with learned counsel for the appellant that an inquiry is not required for a termination of employment under s. 13(2) of the Act. This is evident from the express wordings of the provision itself which reads "Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service." I also find support from the case of *Lim Poh Poh v. Menteri Sumber Manusia, Malaysia* [1998] 1 LNS 440, where the applicant's employment as a waitress was terminated by Hotel Concorde without notice under s. 13(2) of the Act on the ground that she had breached her contract of employment for being continuously absent from work for more than two consecutive working days without prior leave from his employer under s. 15(2) of the Act (the same ground as in this instant appeal). Nik Hashim J (now Federal Court judge) said at p. 8 "Pemohon komplain beliau tidak diberi peluang melalui satu inquiri sebelum dia ditamatkan perkhidmatannya. F G H I

A Dalam hubungan ini, pihak saya dengan hormat, bersetuju dengan Peguam Kanan Persekutuan bagi pihak Menteri, bahawa pemohon tidak berhak kepada inquiri kerana penamatan telah dibuat di bawah s. 13(2) dan bukan di bawah s. 14(1), akibat daripada pemecahan kontrak perkhidmatan oleh pemohon di
B bawah s. 15(2) Akta Pekerjaan 1955. Ini jelas dinyatakan dalam surat penamatan perkhidmatan "LPP2" kepada pemohon". I agree with His Lordship's view. Thus I find there is no merit in the respondent's argument that there must be a domestic inquiry.

C **[7]** The respondent submitted that since the respondent's termination from service neither falls within the exceptions in reg. 4(1)(a) or (b) or (c) of the Regulations, the general provision in reg. 4(1) is applicable and the respondent is entitled to termination benefits.

D **[8]** With regret I cannot agree with the respondent's argument. The relevant provision relied on by the Labour Officer is reg. 4(1)(c) of the regulations. I agree with the appellant's submission "The proviso in reg. 4(1)(c) is only applicable when the
E employee terminates the contract of employment as a result of the wilful breach by the employer This is because reg. 4(1)(c) specifically states the termination of the employment contract must be done voluntarily by the employee. Hence, only if the employee terminates the contract voluntarily because the employer had wilfully breached a condition of the contract (s. 13(2) EA 1955), would the
F employee be entitled to termination benefits. On the present facts, it was the employer (ie, the appellant) who terminated the contract of employment as a result of the wilful breach by the employee (ie, the respondent)". I agree with the appellant that it is contrary to the spirit and intent of the Act to pay termination benefits to
G employees who wilfully breach their contract of employment with their employers.

(a) Further, the Act was enacted for the purpose of providing fairness for both the employer and employee as is evident from the "The Proceedings of the Legislative Council of the
H Federation of Malaya on the Employment Bill 1953 (March 1955 to June 1955)" at p. 616. That being the case it would be most unreasonable, illogical and against the true spirit and intent of the Act for the respondent, who having breached her contract of employment to gain a benefit. Therefore, I find the
I Labour Officer has erred in law when he held that although

the respondent's services were terminated by the appellant under s. 13(2) of the Act for her wilful breach, the respondent was entitled to termination benefits of RM8,660.73 on the ground that reg. 4(1)(c) of the Regulations is applicable.

[9] For the given reasons, the appeal is allowed with costs to be taxed unless otherwise agreed.